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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 342

STATE OF FLORIDA, EUGENE S. MATTHEWS, MAMIE EATON-GREENE, AND W. B. DOUGLAS, ETC., ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, GEORGIA PUBLIC SERVICE COMMISSION, AND ATLANTIC COAST LINE RAILROAD COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

REPLY OF ATLANTIC COAST LINE RAILROAD COMPANY TO THE BRIEF OF APPELLANTS OPPOSING THE MOTION OF ATLANTIC COAST LINE RAILROAD COMPANY TO DISMISS THE APPEAL OR AFFIRM THE DECISION OF THE DISTRICT COURT, WHICH BRIEF ALSO OPPOSES THE ATLANTIC COAST LINE'S STATEMENT AGAINST JURISDICTION.

A. Reply to Statement of Appellants under the Title "The Original Proceedings Before the Interstate Commerce Commission" (Page 5 of Appellants' Brief).

We contend that it is inaccurate to state that in the original petition before the Interstate Commission "The Atlantic Coast Line appeared in defense of both the interstate rate and the intrastate rate."

The Commission, in its first report (146 I. C. C. 717), at 720, states the position of the Atlantic Coast Line Railroad Company, as follows:

> "The intervening carriers contend that defendant's (Atlantic Coast Line) Florida intrastate rates are unreasonably low and are opposed to their continuance and to any reduction in defendant's interstate rates, contending that if the latter are reduced competition will necessitate corresponding reductions in their rates.
>
> "Defendant does not consider the intrastate rates reasonably compensatory for general application throughout Florida but proposes to continue them, if permitted to do so, until the logs referred to in the Carpenter-O'Brien contract have been transported. It strongly opposes the use of such rates as a measure of reasonable interstate rates from Florida to Georgia. While not admitting that the interstate rates are unreasonable, defendant submitted a proposal to revise such rates down to the level of the Alabama intrastate log rates which became effective June 1, 1925, pursuant to an order of the Alabama Public Service Commission."

The Atlantic Coast Line's witness, J. W. Perrin, testified that the Atlantic Coast Line had entered into a contract with Carpenter-O'Brien Company (which became Brooks-Scanlon Corporation) "under which it agreed, throughout the length of time necessary to move the logs covered by the contract at a specific rate subject only to law and to change or cancellation required by law, or by judgment of

any court or commission of competent jurisdiction." (See Volume 1, page 475, of the record in cases Nos. 493, 495, and 495, October term, 1929, of this Court—this case being a continuation of that, the evidence in that case is a part of the record in this.)

The Atlantic Coast Line's management elected to comply with the terms of the contract in good faith, even to the extent of applying "these abnormally low rates."

In volume II of the same record, at page 719, the same witness gives an account of the conference between shippers and officers of the Atlantic Coast Line, held on June 24, 1926—after the case had been instituted before the Interstate Commerce Commission. In that conference the witness quotes a representative of the Atlantic Coast Line as stating that the Coast Line

> "would defend the reasonableness of its existing interstate rates, and that while the Florida intrastate rates are very low, the Atlantic Coast Line would submit the entire history of those rates with an expression of its desire to live fully up to the terms of the Carpenter-O'Brien contract—now known as the Brooks-Scanlon Corporation contract—as long as it is legal to do so without extending these low rates to interstate business or to other log hauls."

The position of the Atlantic Coast Line in reference to the Brooks-Scanlon Corporation's contract was changed by a change in its contractual relationship with the latter corporation. This came about between the time of the decision of the United States District Court in the case of *Florida* v. *United States*, 30 Fed. (2d) 116 (January 17, 1929), and the second hearing in that case, reported in 31 Fed. (2d) 580 (March 22, 1929). This removed whatever restraint the Coast Line had been under because of the Brooks-Scanlon contract; and at all subsequent hearings

of this case the Coast Line has taken an active part in opposing the continuance of the intrastate rates which are known as the "Cummer" scale of rates.

B. Reply to Section of Appellants' Brief Entitled "The Further Hearings Had Before the Interstate Commerce Commission under Its Order of April 6, 1931" (Beginning at Page 8 and Ending on Page 15 of Appellants' Brief).

The purpose of this section in the brief appears to be to induce the finding that the power of the Commission under § 13(4) of the Interstate Commerce Act did not attach. This position was ruled against the contention of the appellants by the United States District Court, assembled in accordance with the statutes, in the case of *Florida* v. *United States*, 30 Fed. (2d) 116, beginning with the fourth paragraph of the opinion at page 119, which section of the opinion ends with these words:

> "The State rate was thereby clearly put in issue and the power of the Commission under section 13(4) invoked."

It was again likewise ruled against the appellants by the same court in the reopened hearing before it in the case of *Florida* v. *United States*, 31 Fed. (2d) 580, beginning at the bottom of page 581 (March 22, 1929). It was clearly and decisively ruled against the contention of the appellants by this Court in the case of *Florida* v. *United States*, 282 U. S. 194, at 209.

Furthermore, in the motion of the Georgia Public Service Commission to the Interstate Commerce Commission to reopen this case, it was alleged in paragraph 5 as follows:

> "Complainant respectfully moves this Commission to reopen the said cause and to proceed in the manner

prescribed by law and the rules of this Commission to make the determinations required by the situation and to issue such report and to make such findings and orders as will result in removing the discriminations set out in the original petition."

And the prayers of said motion were as follows:

"WHEREFORE, complainant prays:

(*a*) That the Atlantic Coast Line Railroad Company, and all of the persons, associations, partnerships or corporations who have intervened in this cause, be given notice of this motion; that the State of Florida be notified thereof; that this Commission proceed to make such further findings and to issue such further reports and orders in this cause as it may deem to be requisite or necessary to fully accomplish the purposes of the original petition and of this motion.

(*b*) That this Commission prescribe just, reasonable, non-discriminatory and non-prejudicial interstate rates to be observed and charged by the defendant carrier for the transportation of carload shipments of logs, from all points located in the State of Florida to all destinations located in the State of Georgia; that the measure of said rates be no higher than the rates concurrently in effect for the same kind of property, from producing points located within the State of Florida, moving in intrastate commerce, to destinations within the State of Florida.

(*c*) That this Commission issue such other and further reports, findings and orders as this Commission may deem proper, to the end that the discrimination referred to in the original complaint be removed and remedied."

In the motion of the Atlantic Coast Line to reopen the the case before the Interstate Commission, recitation was made of this Court's opinion entered in this cause on Jan-

nary 5, 1931 (282 U. S. 194), and paragraph 6 of said motion was as follows:

> "Movant respectfully shows that it is necessary that this Commission reopen the said cause and proceed therein to make such additional findings and orders as may be proper in the light of the opinion of the Supreme Court of the United States in this cause."

And the prayers of said motion were as follows:

> "WHEREFORE movant prays:
>
> (*a*) That the Georgia Public Service Commission, and all of the persons, associations, partnerships or corporations who have intervened in this cause, be given notice of this motion; that the State of Florida be notified thereof; that this Commission proceed to make such further findings and to issue such further reports and orders in this cause as it may deem to be requisite or necessary.
>
> (*b*) That this Commission prescribe such intrastate rates in Florida for the transportation of logs over the lines of this movant, for distances up to one hundred seventy (170) miles, and for distances beyond said one hundred seventy (170) miles, as may be lawful.
>
> (*c*) That this Commission issue such other and further reports, findings and orders as this Commission may deem proper."

The United States District Court in dealing with this position in its conclusions of law stated:

> "The contention is vigorously renewed that the proceeding before the Commission never was one in which a burden by the State rates on the revenues of the carrier was made an issue, so that the Commission could properly so find and on that ground prescribe a State rate under § 13(4) of the Act. We adhere to the views expressed in our former decisions, 30 Fed. (2d), 116; 31 Fed (2d) 580. It is true that the Georgia Public

Service Commission in its original complaint did not ask that the Florida State rates be raised, and it rather preferred that the interstate rates should be lowered, but the complainant directly challenged the States rates, alleged that they caused a discrimination against interstate commerce within § 13 of the Act, and prayed for its removal. The State of Florida was duly notified as required by that section, and on full hearing discrimination was found to exist and sought to be removed by prescribing a new State rate by virtue of § 13(4). This Court held that discrimination by revenue burden was within the case before the Commission, and upheld the order on that ground only. The Supreme Court, 282 U. S. at p. 209, so far from disagreeing said: 'As the Florida Railroad Commission appeared in defense of the intrastate rates, and the Railroad Company the rates of which were in question and other parties in interest, both shippers and carriers were heard, the question now presented relates to the substance of the determination of the Commission and its support in the evidence, rather than to mere matters of pleading and procedure. In making its order the Commission could exercise all the authority conferred by the Interstate Commerce Act for the purpose of removing such unjust discrimination as it found to exist. If the Commission had made adequate findings, supported by evidence, upon the point under consideration we should not be disposed to conclude that the order must be upset because of the manner in which the proceeding was initiated or because of the generality of the allegations of the complaint.' Much more forcibly do these words apply, now that the parties have had another full hearing upon this precise issue, with full knowledge that courts and Commission regarded that issue not only as present but as controlling. The Commission having in due form found that the State rates do cause an unjust discrimination against interstate commerce by the very words of §13(4): 'it shall prescribe the rate * * * thereafter to be charged * * * in such manner as in

its judgment will remove such discrimination.' It is the judgment of the Commission and not the wish or the prayers of the Georgia State Commission that is to determine what shall be done about the discriminatory State rate."

C. Reply to Section of Appellants' Brief Entitled "The Second Reopened Proceedings Before the Interstate Commerce Commission" (Beginning at Page 15).

This section of the brief deals with the fact that certain railroads had put into effect experimental rates, forced upon them by competition of trucks and by combined rail and truck competition. These rates were put in on the basis of carloads; that is, the same rate applied to a car carrying 60,000 pounds of logs as to one carrying 120,000 pounds; both moving over the same rail, between the same points, and even in the same train. This system has been many times condemned by the Commission and by the courts. These rates were dealt with in the Atlantic Coast Line's original motion in this cause and the brief in support thereof. Appellants' brief shows that these reduced rates are rarely ever applicable between all points on any road. Pages 16 and 16*a* of their brief show that the rates are applicable between all points on only two roads out of the twenty referred to. On some of the roads, for instance, the Southern Railway, their application is very limited to 9 manufacturing points; on the Seaboard Air Line, to 3 manufacturing points; on the Central of Georgia, to 4 manufacturing points; on the Illinois-Central, to 12 manufacturing points; etc.

We submit that this section of appellants' brief shows that it is inaccurate to say that:

"There is no doubt that in Louisiana, Mississippi, Alabama, Tennessee, parts of Georgia and Western

Florida, the general level of interstate and intrastate rates are on the basis of the Newly Reduced Rates."

This subject will be dealt with again in replying to a further part of appellants' brief.

I. Reply to Point I of Appellants' Brief (p. 21).

This point, in substance is, that at the times the last two reports of the Interstate Commerce Commission were entered, there was no substantial disparity between the scale of Florida intrastate log rates (the Cummer scale) and the general level of interstate log rates in the southern rate group.

The point is based upon the theory that a number of railroads, listed at pages 16 and 16a of appellants' brief, had filed with the Interstate Commission experimental reduced rates on logs, for limited distances, and applying to limited points on their respective lines (on two lines, as has been pointed out, the newly reduced rates apply between all points).

The first answer to this is, that many, if not all of the tariffs relied upon by the appellants to establish the contention made in this point were introduced before the Commission in the reopened hearing which was ordered by the Commission on October 21, 1932. This evidence was introduced at a hearing held for that purpose on November 21 and 22, 1932, and the Commission's report, based on that evidence, was made on January 9, 1933. So that, it is plain that the Commission considered the merits and demerits of this contention and determined that those rates were not such as to exercise controlling influence. The Commission further determined that those new rates did not require or justify a change in the findings previously made by it on the 5th day of July, 1932 (186 I. C. C. 157). See Also 190 I. C. C. 588-600.

The value to be given to those rates was especially within the jurisdiction of the Commission and its judgment on that subject is final.

In the original motion we cited to this effect *Northern Pacific Railroad* v. *United States*, 60 Fed. (2d) 302, 318:

> "Competition may compel such a reduction in rates as to altogether destroy their value for the purpose of comparison."

In our original motion we cited *Louisville & Nashville Railroad Company* v. *United States*, 238 U. S. 1, 13.

It has been recognized many times that competition may force rates which are so low as to make them an improper standard of comparison, and whether or not that condition exists in any case is, of course, a function of the Commission. (See Alldredge on Rate-Making for Common Carriers, pp. 52, *et seq.*)

The Commission did not approve these rates, its language in reference to them, in its report of January 9, 1933 (190 I. C. C. 588, 600) being:

> "Generally we do not approve of rates published in amounts per car regardless of weight and nothing contained herein should be considered as an approval of rates so published on logs. These per car rates on logs are not here in issue and no one has complained to us in any other proceeding that they are unreasonable, unduly preferential, or otherwise unlawful."

The district court did not consider that those rates required a different ruling on the part of the Commission.

The remainder of appellants' argument in support of Point I of their brief appears to be based on the theory that the intrastate scale of rates complained of must work a discrimination against all of the roads in the Southern rate group; that is, there must be an ascertainment of what was the aggregate value of the properties of all the carriers

in the group "as a whole", and there must be an "aggregate" of the income of all the carriers in the group "as distinguished from the income of a particular carrier."

The argument, carried to the conclusion apparently intended, would permit the application of the sections of the Interstate Commerce Act for the removal of unjust discrimination against interstate commerce only when the aggregate income of all the carriers in a rate group was ascertained; and when the aggregate value of the properties of the carriers in that group had been likewise ascertained; and would permit a shipper to require the originating or connecting carrier, or both, to render intrastate transportation service for a reward less than that which is reasonable to the carrier, and which would not provide the carrier with sufficient revenue from its intrastate transportation to pay its fair proportionate share of the cost of maintaining an adequate railway system.

The shipper's right as to the charge which a carrier by rail may make for service rendered to him, is to demand a charge which is reasonable as to him, and to the carrier under the law.

The power of the Commission under Section 15 (*a*) of the Act to regulate commerce is to be used "in the exercise of its power to prescribe just and reasonable rates."

The requirement of § 1 of the Act—that all rates shall be reasonable—and the requirements of §§ 2 and 3 against unjust discrimination and unreasonable preference or advantage, were not repealed by § 15 (*a*).

The duty of the Commission to make rates is not satisfied by making rates to

> "clear confiscation and yield something toward a fair return, and that they be equally applied to all to whom the carrier owes an immediate duty under Sections 2 and 3 of the act, and that the provisions of Section 4 are observed. These statutory duties directly concern

those who are immediately affected, but who form only a portion of the great public whose interest in the maintenance of an adequate transportation system has been recognized by Congress in the act we are charged to enforce and administer."

See *Lake Cargo Coal Company*, 139 I. C. C. 367, 392.

This recognition is made by this Court in the *Dayton-Goose Creek Railway Company* v. *United States*, 263 U. S. at 487.

On ample evidence the Interstate Commission has twice held that the Florida intrastate rates complained of in this proceeding are unjust and unreasonable and unjustly discriminatory (*Georgia Public Service Commission* v. *Atlantic Coast Line Railroad Company*, 146 I. C. C. 717, 724; Same case, 186 I. C. C. 157).

Those findings of the Interstate Commission have been sustained by the United States District Court for the Northern District of Georgia, assembled as provided by statute, not only in the present case, but as well in its opinion in the case of *State of Florida* v. *United States*, 31 Fed. (2d) 580, 582.

Apparently the argument of appellants proceeds upon the theory that the Commission may make an unreasonable rate on a given commodity for one railroad, provided that all the rates on all transportation service of all the railroads in that group yield a sufficient aggregate income; the theory apparently being that the carrier with the unreasonable rate can be protected by the recapture clause. They rely upon a quotation from the *Dayton-Goose Creek Railway Company* v. *United States*, *supra*, at page 485, to the effect that

> "The control of the excess profit due to the level of the whole body of rates is the heart of the plan. To divide that excess and attempt to distribute one part to

> interstate traffic and the other to intrastate traffic would be impracticable and defeat the plan. This renders indispensable the incidental control by Congress of that part of the excess possibly due to intrastate rates, which, if present, is indistinguishable."

The expression "heart of the plan" was not used to justify the making of a rate by a State which is unreasonable as to any carrier; or to justify the making of a rate by a State which is so much less than the interstate rate as to place a burden upon interstate commerce; or to justify the making of a rate by a State which is so low that it does not carry its fair proportionate share of the cost of maintaining an adequate railway system. Nor was the expression intended to permit the shipper to demand rail transportation service at rates which are less than just and reasonable, or which are unjustly discriminatory against persons, places or classes of traffic, or against general interstate commerce.

> "The devotion of the carrier's property to public use is qualified by the carrier's right to a reasonable reward." *Northern Pac. Rwy.* v. *North Dakota*, 236 U. S. 585.
>
> "The statute does not require that the net return from all the rates shall affect the reasonableness of a particular rate or a class of rates. In such an inquiry, the Commission may have regard to the service done, its intrinsic cost, or a comparison of it with other rates, and need not consider the total net revenue at all." *Dayton-Goose Creek Ry.* v. *United States*, 263 U. S. 456, 480. See also same case at page 482.

The recapture clause of the Interstate Commerce Act has been repealed by the *Emergency Railroad Transportation Act of 1933*. If appellants' contentions are correct, the effect would be to destroy the power of the Interstate Commerce Commission to prevent unjust discrimination against

interstate commerce by intrastate rates, although the Emergency Act clearly indicates that its purpose is to "foster, protect and control" interstate commerce.

The construction of the Act contended for by appellants would make it perfectly impracticable and would defeat its purposes.

There has been power in the Commission to prohibit unjust discrimination against interstate commerce from its beginning. That power did not come into existence with § 13. *Board* v. *Great Northern Railway*, 281 U. S. 412, 424, *et seq.* It did not disappear with the repeal of the recapture clause.

This section of appellants' brief (page 31) ends with the argument that because certain railroads, as stated above, had filed for intrastate and interstate transportation, for limited distances, reduced rates on logs applicable to carloads, regardless of quantity; and that those rates were forced by competition, they should become the controlling standard for the making of all other rates for the transportation of logs in the southern territory. The Interstate Commission in this case found against that contention, and the Interstate Commission's finding on that subject was sustained by the United States District Court.

II. Reply to "Point II" of Appellants' Brief (Pages 31-32).

In Point II appellants claim that "The Interstate Commerce Commission has failed to make the basic or essential findings necessary to support a State-wide order prescribing intrastate rates. There is no substantial evidence before the Commission to support such findings."

The evidence before the Commission covered the entire State of Florida. We have referred to the reports of the Commission in our original motion. These amply refute the claim that there were no basic or essential findings, and no substantial evidence to support them.

No specific failure of the evidence is pointed out by the appellants in this section of their brief. We respectfully submit that no such failure exists. We have shown in our original motion that the court stated that there was not only adequate evidence to sustain the findings of the Commission, but that the findings were such as they themselves would have made. A copy of that opinion is attached to the original motion, and substantial extracts from it are quoted in the part of our motion under the title "Decision of the United States District Court of February 24, 1933."

The district court in its opinion in *State of Florida* v. *United States*, 31 Fed. (2d) 580, 582, made the following summation of the evidence:

> "There was in evidence, also, comparisons of the attacked rate with rates on similar logs of other railroads in Florida and in adjacent States, and on other articles, such as sand, gravel, brick, lime and cement, which, like logs are shipped in large lots, loaded and unloaded by patrons, and expose the carrier to little risk of loss. There was further comparison with interstate rates established by the Commission itself for this same railroad and in this same territory. All these rates were shown to be from twice to thrice the attacked log rate. On the face of things the log rate is too low, and likely to burden the carrier. The Commission expressly finds that it is obviously unremunerative. It is shown that the commerce in logs over the Coast Line system is and will continue to be very large, and this item of its rates is therefore an important one. We cannot say the order is without evidence to sustain it, on the ground that the former State rate was an undue discrimination against general interstate commerce over the Coast Line Railroad."

All of the evidence which was before the Commission then was before it in the last hearing, and a great deal more.

The discussion of the evidence in the succeeding parts of this reply are referred to and made a part of this section.

III. Reply to "Point III" of Appellants' Brief (pp. 33-34).

This point is based upon the allegation that:

> "There was no finding and no evidence of the amount of revenue which had been derived in the past from this particular traffic in question under the Cummer scale of rates."

It is stated under this point that:

> "The report of the Interstate Commerce Commission does not purport to find the amount of revenue derived in Florida from the Cummer scale of rates and there is no evidence from which any such finding could be made. This data could have been produced."

The witness MacPherson testified to the number of cars of logs shipped by the Wilson Cypress Company in the years 1926, 1927, 1928, 1929 and 1930 and stated the amount of the gross freight charges paid each year, the aggregate of which was $562,295.38. (R. 1282 of reported evidence of the hearing held June 10-12, 1931.)

The witness Perrin testified (R. 1496 of reported evidence of hearing July 20-21, 1931), locating the various tracts of timber in Florida and showed that there were 21,913,000,000 feet of pine timber in Florida at the time he testified. Circular 124 of the United States Department of Agriculture was introduced in evidence and showed the timber conditions in Florida in great detail. This is discussed at pages 172 and 173 of the report of the Commission in 186 I. C. C. This circular confirms the evidence of the witness Perrin.

The witness Perrin at page 1497 of the reported evidence of the hearing had July 20-21, 1931, testified:

"Within my experience there was a time when the same conditions existed in the other States served by the Atlantic Coast Line as now exist in Florida, whereby the large bulk of lumber manufactured was by large saw mill companies holding large tracts of standing timber. The real difference between Florida and these other States is that the manufacture of lumber in its larger proportions began earlier in the other States than in Florida, and the large individual holdings of standing timber in the other States have been cut earlier than in Florida. Nevertheless, these other States, in which 60 per cent of the Atlantic Coast Line's mileage is located, are still producing 50 per cent of the lumber that we transport. The lumber industry at points on the Atlantic Coast Line in North Carolina and South Carolina still constitutes one of the most important industries to be found in those sections, although the manufacture of lumber is no longer confined so largely to the operations of large companies, many of which no longer exist. I have previously stated that approximately one-half of the Atlantic Coast Line's log traffic is in States other than in Florida. There is no reason that I know of upon which to base the conclusion that the future of the lumber industry in Florida will be any different from what has been, and still is, the lumber manufacturing conditions in these other States, and the fact that standing timber in Florida may within the course of a few years become scattered in its larger proportions does not mean that as long as standing timber exists there will not be a demand for its use."

The Commission found that the production in Florida during the six years, 1925-1930, was 4.564 billion feet; that the regrowth in that period was 2.129 billion feet; that the net depletion was 2.435 billion feet, "leaving the pine timber stand in Florida 21.913 billion feet" in July, 1931.

Exhibit No. 30 (R. 321 in cases Nos. 493, 494, and 495, October term, 1929) shows the number of cars of logs

hauled to Milldale, Florida, from 1889 to 1916, and the amount of freight paid year by year. Those shipments were hauled under the Cummer scale of rates.

Exhibit No. 35 (R. 360) shows the number of cars of logs shipped by the Putnam Lumber Company to Milldale, Florida, for the years 1919-1925, both inclusive; the number of feet, and the amount of freight paid. The same exhibit shows for the years 1922-1925, both inclusive, the amount of cypress logs shipped by the Putnam Lumber Company to Ortega, Florida, the number of feet, and the amount of freight paid.

Exhibit No. 41 (R. 378) shows that the Brooks-Scanlon Corporation had, on August 31, 1926, available uncut timber to the extent of 1,027,432,000 feet; which when logged would amount to 186,800 carloads of logs; and also showed the amount of freight which would be paid to move the timber to the mills.

Exhibit No. 42 (R. 380) shows the number of cars of logs shipped from Carbur and Scanlon to Eastport, Florida, for the years 1915-1926, both inclusive, and the amount of freight paid. All of those shipments were made under the Cummer scale of rates.

Exhibit No. 61 shows for the period February 9, 1929-January 31, 1931, both inclusive, the number of cars of logs, more than six feet in length, hauled by the Atlantic Coast Line, the weights, and revenue collected, together with the amount of revenue which would have accrued on the basis of the Cummer scale of rates. 18,602 cars of logs were hauled during that period and the revenue collected amounted to $571,508.94; under the Cummer scale it would have amounted to $281,225.75, or a difference of $290,283.19.

Exhibit No. 128 shows the number of cars of logs moved over the Atlantic Coast Line intrastate in Florida, during the period from February 1, 1931, to June 1, 1931, both in-

clusive; that is, it carried forward Exhibit No. 61. The number of cars moved during that period was 2765. They moved from fifty-two different stations to seventeen points of destinations. This is referred to by the Commission in its report in 186 I. C. C. at 176.

Exhibits Nos. 61, 111 and 128, above referred to, were offered at the reopened hearing before the Interstate Commerce Commission after the decision of this Court in cases Nos. 493, 494 and 495 (282 U. S. 194).

The Commission's report (186 I. C. C. 169, *et seq.*) deals with these facts, which were carefully analyzed by it.

Complaint is made by the appellants because the Commission did not order the Atlantic Coast Line Railroad Company to compile and produce a statement showing the amount of revenue derived in Florida from the Cummer scale of rates. The district court in its opinion of February 24, 1933, in its conclusions of law, dealt with that subject as follows:

> "Early in the reopened proceedings before the Commission the complainants made a written demand on the Atlantic Coast Line R. R. Company that it produce a statement supported by individual car-record movements, showing certain details as to cars of logs moving on its lines between points in Florida and Georgia for each of the years 1926, 1927, 1928, 1929 and 1930, a like statement concerning cars moving within the State of Florida for each of those years, and a statement showing the gross earnings from both interstate and intrastate shipments of such logs for each of those years. The Railroad Company in answer stated that it expected to furnish certain appropriate data about its log traffic, but could not get up the statements requested for lack of time and because its records did not show the distinctions in log traffic required. The Railroad Company did produce details of its log traffic since 1928, but not before. The Commission refused to compel further compliance. It will

be noted that no specified books or papers were asked to be produced, nor any specified witness called on to tell what he might know. We are aware of no rule of law or practice which would require a litigant laboriously to compile information for his adversary, even if it were in his power to do so. Certainly it would lie in the discretion of the tribunal to decline to compel it. We find in such refusal no cause to upset an order founded on evidence which was duly produced before that tribunal.

But it is said that the information demanded was essential to a finding of unjust discrimination, the revenue before 1929 under the State rates being one of the things mentioned by the Supreme Court as necessary to be established. We do not understand that the revenue, either gross or net, produced by the State rates must be exactly established, but only that the operation of those rates and their effect upon the carrier must be investigated and found. It was here established that the State rates produced a loss, and were a drain on the carrier. It might have been desirable to show the extent of the loss, but if that be impracticable, and if it appear that the loss will be in the future substantial and the carrier is not in position to absorb it without detriment to his service and support as an interstate carrier, a sufficient case is made to find an unjust discrimination against interstate commerce, and to require its correction."

It is rather technical for the appellants to say in this point that:

"At no time did the carrier offer evidence to show the amount of revenue derived or the amount of movement had under the Cummer scale either before or after the entry of the unlawful order of the Interstate Commerce Commission dated August 2, 1928, or after that order was set aside."

Evidence was offered by the carrier which showed the amount of revenue derived and the amount of movement

of logs from February 9, 1929, to January 31, 1931; and also to show what the revenue would have been if the Cummer scale had been applied thereto, as pointed out above; also for the five months from February, 1931, to June, 1931, both inclusive (186 I. C. C. 188). The other evidence referred to, as to the volume of traffic in logs and the amount of freight collected thereon was not offered "by the carrier", but it was offered by certain of the shippers and was, none the less, a part of the record.

IV. Reply to Appellants' Point IV (Pages 34-40).

This answers Point IV of appellants' brief which asserts that:

> "There was no finding as to the amount of revenue which can reasonably be expected to be derived by the carrier from the traffic in question 'under the increased rates.'"

The latter part of the argument of this point (page 40) claims that "as a direct result" of the Commission's order mills were removed from Eastport, Milldale, and Ortega.

The Commission did not agree with that statement. In its report of July 5, 1932 (186 I. C. C. 171), the Commission takes notice of the amount of logs moved from February 8, 1929, to January 31, 1931 (the Cummer scale was not in effect during those months), divides that into two parts; the first from February 8, 1929, to January 31, 1931; and the second, the succeeding twelve months. The second part showed a decline in the number of cars moved and in the amount of revenue. The Commission said:

> "From what has been said above it is clear that the decline in the Florida log movement can not be ascribed wholly to the rate advance. Part of the decline has no doubt been due to that cause but a large

part has been due to the change from mill locations uneconomical because too far from the timber. The generally depressed conditions throughout the country, in Florida, and in the lumber industry generally and in the Florida log industry have also had a marked influence upon the volume of the log movement in Florida" (186 I. C. C. 171).

The Commission then shows the log movement and the lumber movement over a period of years (186 I. C. C. 172).

The Commission's statement to the effect that the cause of the removal of the mills was that their location had become uneconomical because "too far from the timber", is borne out by the witness, M. L. Fleishel, president of the Putnam Lumber Company (Record in cases Nos. 493, 494, and 495, October Term, 1929, Supreme Court, which record is a part of the record in this case, at pages 608, 610, and 615). Mr. Fleishell states at page 615:

> "We are dismantling certain portions of our property, to the amount of about one million five hundred thousand dollars, and moving it from tidewater to the woods, because the economy of the thing appeals to us and causes us to do that, and certainly for no other reason whatever."

And by the witness F. H. Wilson, then general manager of the Wilson-Cypress Company, at page 580 of the above-mentioned record, where he said:

> "I would put the mill into the timber because it would be an economical way of manufacturing the timber regardless of any log rate; not because I had access to the Florida rate at Valdosta."

(Valdosta is in Georgia and the witness was saying what he would do if he were locating a mill in Georgia); and by the evidence of Mr. C. R. McPherson, President and General

Manager of the Wilson Cypress Company, to the effect that:

> "It is more economical to locate the mills in the timber" (Transcript of the hearing on June 10-12, 1931, page 1310);

and by the witness J. S. Foley, then Vice President and General Manager of the Brooks-Scanlon Corporation (page 661 of the above-mentioned Supreme Court record), who testified:

> "It is distinctly to the advantage of the owner of the timber to locate his mill at the timber. There are other practical reasons why it is beneficial to have a mill located at the timber."

At pages 662 and 663 Mr. Foley goes into further details to the same effect. At page 664 he speaks of the conditions which have changed since the mills were located at tidewater and again declares it is more economical to have the mills at the source of supply.

The Commission found in its first report (146 I. C. C. 724) that the Cummer scale of rates was "less than reasonably compensatory". This was affirmed in its second report (186 I. C. C. 165).

In its second report (186 I. C. C. 166, *et seq.*) the Commission entered into an elaborate cost statement, and found that for the average distance of 81.36 miles (186 I. C. C. 186-187) the total cost per car to transport logs intrastate in Florida was $24.69 against an average revenue per car of $15.12 under the Cummer scale of rates. The Commission then states (186 I. C. C. 187):

> "The above figures undoubtedly understate the cost of transporting logs in Florida for several reasons. One of these is that costs per unit in Florida are higher than the average for the entire road or system including Florida. Another reason why the computation on

the basis of average costs per unit for the system understates the cost of transporting logs in Florida, is that these average costs per unit do not include anything for joint facility and equipment rents" (186 I. C. C. 187).

The indicated costs also did not include the cost of transporting nonrevenue or company freight.

The Atlantic Coast Line's accountant, Lamb, stated the cost of transporting these logs in two forms, one eliminating all terminal expenses, all hired equipment expense and all agency expenses. The cost calculated on this basis is shown in column A of Mr. Lamb's Exhibit No. 86; and for the average distance of 81.36 miles that cost amounted to $25.24 against the Commission's ascertainment of $24.69. The operating costs thus ascertained for the average distance (Exhibit No. 86), before taking into account taxes and return on investment was $17.01, as ascertained by Mr. Lamb, and the Commission's ascertainment of the same cost up to that point amounted to $17.07 (186 I. C. C. 186).

The two accountants came very close together in their calculations. Neither of them claimed that it was practicable to ascertain accurately the exact cost of transporting any one commodity.

The gross income on a car of logs for the average haul was $15.12 under the Cummer scale of rates.

Mr. Lamb's ascertainment of the cost under his column B (Exhibit No. 86) was $34.75; this included the terminal expenses, hired equipment expense and agency expenses.

As we have shown above, the Commission states, after setting out its ascertainment of the costs:

> "The above figures undoubtedly understate the cost of transporting logs in Florida for several reasons" (186 I. C. C. 187).

The complaint under this point of appellants' brief is that there was no finding as to the amount of revenue which could reasonably be expected to be derived by the carrier from the traffic in question under the increased rates.

The Commission, as we have seen, had ascertained the exact movements of cars of logs in Florida during the period from February 8, 1929, to January 31, 1931, and from February 1 to June 1, 1931 (Exhibits 61 and 128). Careful analyses were made of Exhibit No. 61 above referred to, showing the number of cars hauled from each point of origin, the number of miles hauled, description of the logs and the revenue collected. These were made by the appellants and were laid before the Commission as Exhibits Nos. 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, and 122.

The amount of standing timber in Florida was known, as we have pointed out.

Exhibit No. 80 showed the number of cars of logs handled by the Atlantic Coast Line, the number of tons handled, and the revenue thereon for the system for the years 1926, 1927, 1928, 1929 and 1930 (the revenue was not available for the years 1926 and 1927). That exhibit also showed the ratio of the log traffic to the total traffic and the ratio of the revenues appertaining thereto, except that the ratio of the revenue was not shown for 1926 and 1927. The same exhibit showed the number of cars of logs handled by the Atlantic Coast Line during the same period and the number of tons hauled in Florida, as well as the ratio of the logs hauled in Florida to the logs hauled over the entire system. In tons the Florida logs hauled were 7.3 per cent of the total Florida traffic. The ratio of the Coast Line's system log traffic revenue to the total freight revenue for the years 1928, 1929 and 1930 was 1.6 per cent (Exhibit No. 80).

The relation of the Company's traffic, measured in revenue and in revenue tons for the system and for the State of Florida, is shown in Exhibit No. 81.

The traffic density of the company for the system, for the State of Florida and for the system, exclusive of the State of Florida, is shown in Exhibit No. 83.

In considering this section of appellants' brief, attention is called to the fact that upon petition of the appellants the Interstate Commission reopened the proceedings before it by its order entered October 21, 1932. This was after the cause had been submitted to the United States District Court but before its decision had been rendered. After the case was reopened before the Commission the court suspended action awaiting further report of the Commission.

Extensive new and additional evidence was taken, and a new and additional report of the Commission was rendered on January 9, 1933 (190 I. C. C. 588). The Commission, in that report, took full cognizance of the changes that had come in the economic conditions of the country; and of the changes which were claimed by the appellants to have been worked by certain experimental rates which had been put into effect to meet truck and other competition.

After making consideration of those facts, the Commission reaffirmed its report of July 5, 1932.

Supplemental pleadings were filed by the appellants in the district court of the United States, and on February 24, 1933, the court entered its order together with its conclusions of fact and of law. This has been heretofore set out in our original motion, and has been referred to in this reply. The court sustained the Interstate Commerce Commission.

We respectfully state that the evidence before the Commission was ample to justify its findings, and the district court not only so found, but passed its independent judgment thereon, arriving at the same conclusions.

That data constitutes the bases from which the future effect of the Florida intrastate rates is to be judged. With that information the Commission determined that the rates fixed by it in its order of August 2, 1928, reaffirmed July 5, 1932, should be adhered to. The court sustained that position.

The Interstate Commission in this case made its finding of the unreasonableness of the Florida intrastate rates on logs (the Cummer scale) not on the theory that bare unreasonableness of a State rate is sufficient to give its jurisdiction over that rate, but the theory on which the Commission proceeded was that the Cummer scale of rates did not permit the traffic to which it applied to bear its fair proportionate share of the expense of rendering that transportation service, and in consequence placed a burden upon the interstate commerce. The Commission makes the following statement:

> "The defendant urges that the revenues produced by the Cummer scale are insufficient to cover the cost of the service performed; that no traffic is of value from a revenue standpoint unless it yields more revenue than the cost of its handling; that its study of the result of the operation under the Cummer scale is conclusive to it that such operation yields it no profit, but, on the contrary, results in an actual loss on the log traffic as a whole. It is manifest that if the Cummer scale produces less revenue than the cost of the service, declines in the traffic have the favorable effect of reducing defendant's losses and that an increase in the traffic would only serve to augment those losses. In support of its contention that the Cummer scale results in losses, defendant submitted voluminous evidence bearing upon the cost of transporting logs in Florida. It is necessary to consider this evidence with a view to determining whether it shows that the Cummer scale rates do result in revenue losses" (186 I. C. C. 177).

The Commission then makes a long study of the costs and expenses and determines that the cost of this traffic is greater than the gross revenue received from it. After making this study, the Commission states the following conclusions:

> "In determining whether the Cummer scale results in unjust discrimination against interstate commerce the fundamental question, in the language of the Supreme Court in *Wisconsin R. R. Comm.* v. *C., B. & Q. R. Co.*, 257 U. S. 563, 658, and in *Florida* v. *United States*, 282 U. S. 194, 211, is whether the traffic moving on that scale pays 'a fair proportionate share' of the cost of maintaining defendant, or whether it causes an undue revenue burden upon the interstate traffic of defendant. The record shows the low earnings of defendants; the low earnings on its log traffic as compared with its earnings on other low-grade commodities; the much lower earnings on its Florida log traffic than on its interstate log traffic; and the much lower level of the Cummer scale than of other scales applicable interstate and intrastate throughout the south. These facts and the cost evidence clearly warrant the conclusion that the traffic moving under the Cummer scale does not pay its 'fair proportionate share' of operation and maintenance alone" (186 I. C. C. 187).

V. Reply to Point V of Appellants' Brief (p. 41).

In this point the appellants allege that:

> "There was no sufficient finding and no evidence upon which the Commission could base a sufficient finding that the alteration of the intrastate rate would produce or would be likely to produce additional income necessary to prevent an undue burden and to maintain an adequate (national) transportation system."

Much that has been heretofore said applies to this point. The Commission stated that the facts and cost evidence "clearly warrant the conclusion that the traffic moving

under the Cummer scale does not pay its 'fair proportionate share' of operation and maintenance alone" (186 I. C. C. 187).

That the use of the Cummer scale of rates had the effect of decreasing the income (distinguishing between income and revenue) of the carrier was proved by the evidence.

It is not accurate to say that the cost evidence to which the Commission makes reference "is no more nor less than a series of computations based upon system averages", without saying more. In so far as *system* averages were used by the Commission, this has been true only after it was found that the cost of transportation in Florida was very much greater than the cost on the entire system as a whole. The cost which the Commission used in its calculations, was declared by it, as we have pointed out, to be very much less than the actual cost (186 I. C. C. 187).

The Commission did nothing which offends the opinion of this Court in the case of *Northern Pacific Ry. v. Department of Public Works*, 268 U. S. 39.

In so far as unit figures were used, they were not used until the Commission had made the following determination:

> "From the foregoing it is apparent that the operating expenses allocated by defendant to Florida are not actual but constructive expenses, and that they are understated to an unknown extent. In view of this fact, system figures including Florida, which are not in question, may be utilized as the basis for approximating the cost of transporting logs in that State. Ordinarily it would be unsound to use a system unit cost to determine the cost in a particular State, but since it is indisputable that unit costs are higher in Florida than elsewhere on the system, it seems clear that system unit costs may be used to find a cost that may be said to be less than the cost in Florida" (186 I. C. C. 184).

The Commission in its calculations undertook to meet the criticisms which the appellants now aim at the cost studies; and in its report of July 5, 1932, in 186 I. C. C. 185-187 makes the following statement:

> "Appendix E is a computation to approximate the cost of transporting logs on the basis of system average costs per unit, applied to the average carload, tare weight, empty haul, and average distance that class of traffic is hauled in Florida. In this computation attempt has been made to meet as far as possible the criticisms of defendant's cost evidence. For instance, deduction from the freight-service operating expenses has been made for wharves and docks, maintenance and operation of floating equipment, and certain traffic expenses, which the defendant concedes are not involved in handling logs. The deductions for these items include their proportion of the expenses for superintendence, as well as their proportion of the general expenses. The total freight-service operating expenses amounted to $36,308,813 in 1929, and these deductions aggregate $1,281,069, leaving $35,027,744 as the remainder. This amount has been apportioned 70.3539 per cent to road or haulage expenses and 29.6461 per cent to yard or nonhaulage expenses, these percentages being based upon the road and yard proportions of certain of the expenses for maintenance of way and structures and for transportation which are segregated in the accounts between these services in accordance with our rules. These are the proportions used by the witness for the Florida commission in his apportionment of the operating expenses between road or haulage and yard or nonhaulage expenses. Applied to the net amount of the freight-service operating expenses above, namely $35,027,744, these percentages result in road or haulage expenses of $24,643,384, and yard or non-haulage expenses of $10,384,360.
>
> Giving consideration to the criticism that the traffic here involved is carload traffic, and that deductions should be made for the excess terminal expense attribu-

table to handling less-than-carload freight over that attributable to carload traffic, the amount of $2,555,778 has been deducted from the nonhaulage expenses, making the net amount of the nonhaulage expenses $7,828,582 applicable to carload traffic. This deduction of $2,555,778 for platform and excess clerical expenses that are involved for less-than-carload freight, but not for carload freight, is an estimate based upon 75 per cent of the aggregate amount of the expenses for Account 373, 'Station employees,' and Account 376, 'Station supplies and expenses.' As a substantial part of the expenses for station employees and station supplies and expenses is obviously attributable to carload freight, the amount that should be deducted on account of less-than-carload freight was therefore estimated at 75 per cent of these expenses.

Dividing the total haulage expenses, $24,643,384, by the total number of gross ton-miles, 11,600,829,000, comprising both revenue and nonrevenue or company freight, produced an average haulage expense of 0.21243 cent per gross ton-mile, revenue and nonrevenue.

The statistics kept by defendant made no segregation of the loaded-car miles and the gross ton-miles between revenue and nonrevenue freight, and the record does not show the number of tons and ton-miles of nonrevenue freight. Due to this fact it is not practicable to segregate the cost of transporting revenue freight on the basis of including therein the cost of transporting nonrevenue or company freight so that the costs hereinafter developed are understated on this account.

Based on total loaded-car miles (revenue and nonrevenue), 209,835,784, and total revenue ton-miles, 3,281,770,000, there was an average of 15.6397 tons of revenue freight carried per loaded-car mile (revenue and nonrevenue). Using this figure as the divisor, and the total tons of revenue freight carried, 18,951,802, as the dividend, there was approximately a total of 1,211,775 loaded cars of revenue and nonrevenue freight carried. Based on total nonhaulage expenses of

$7,928,582, applicable to carload traffic, the average nonhaulage expenses was $6.45 per loaded car.

In 1929, United States Government taxes (corporation income) amounted to $570,076, and other than Government taxes (State taxes) to $5,669,924, or a total of $6,240,000 for the road as a whole. Based on these figures and total operating expenses of $53,431,589, freight and passenger, taxes amounted to $0.11678 per dollar of operating expenses.

Property investment in 1929 amounted to $306,439,250, and 5.75 per cent interest thereon to $17,602,257. Based on total operating expenses of $53,431,589, freight and passenger, interest on investment amounted to $0.32977 per dollar of operating expenses.

Based upon the foregoing the following is a summary of the computation of the cost of transporting the average car of logs in Florida the average distance of 81.36 miles:

Operating expenses:	
Haulage expenses: 4,994 gross ton-miles X 0.21243 cent per gross ton-mile	$10.61
Nonhaulage expenses: Avgrage per loaded car	6.46
Total operating expenses	$17.07
Taxes: $17.07 (operating expenses) X $0.11678 taxes per dollar of operating expense)	1.99
Interest on investment at 5.75 per cent, $17.07 (operating expense) X $0.32977 (interest per dollar of operating expense)	5.63
Total cost per car	$24.69
Cost per 100 pounds	4.35 cents.
Average revenue (Cummer scale) per car of logs for average haul, 81.36 miles	$15.12

The above figures undoubtedly understate the cost of transporting logs in Florida for several reasons. One of these is that costs per unit in Florida are higher than the average for the entire road or system includ-

ing Florida. Another reason why the computation on the basis of average costs per unit for the system understates the cost of transporting logs in Florida is that these average costs per unit do not include anything for joint-facility and equipment rents. As heretofore indicated the cost is also understated because it does not include the cost of transporting non-revenue or company freight."

The Commission, in its findings of fact, quotes from the Atlantic Coast Line's traffic manager's evidence as follows:

"Not less than one-half of the timber in Florida that is now reasonably adjacent to railroads is reasonably adjacent to the Atlantic Coast Line. Pine timber along the South Atlantic seaboard has been characterized by the United States Forestry Department as one of the fastest reproducing kinds of trees in the world, and the total amount of timber in Florida will be large as a result of regrowth. However, if the Atlantic Coast Line can be assumed to transport 40 per cent. of the logs to be produced in Florida from the timber now standing, it will handle approximately 9 billion feet, or approximately 128,570 cars of logs.

"If the average length of haul should be 81 miles, as was the case in 1929-30, which average haul may be expected to be increased as the timber becomes more scarce, our revenues, under the Cummer scale, at an average revenue of $16.10 per car, would be equivalent to gross revenue of $2,169,977. If the same transportation should be performed at the rates prescribed by the Interstate Commerce Commission, which for the average haul of 81 miles is 5.5 cents per 100 pounds, or $38.50 per car, the gross revenue would be $4,949,945. The difference in the gross revenue under the two scales of rates would be $2,779,968" (186 I. C. C. 174).

It is also found by the Commission that if the Cummer scale of rates had been in effect uniformly on interstate

and intrastate movements throughout the Atlantic Coast Line's entire system during the years 1929 and 1930 its revenue would have been reduced for those two years by $675,384.21 (186 I. C. C. 168).

The Commission also found that during the period from February 8, 1929, to January 31, 1931, the difference in the application of the interstate scale and the Cummer scale on the logs hauled in Florida by the Atlantic Coast Line amounted to $290,283.19 (186 I. C. C. 167).

VI. Reply to Point VI of Appellants' Brief (p. 46).

The appellants make the point that:

> "Even if it were possible to find any unjust discrimination against interstate commerce in this proceeding, there is no finding and no evidence upon which the Commission could base a finding that that discrimination was of such character and consequence that it was the affirmative duty of the Commission, as an important step in maintaining an adequate national railway transportation system, to remove it."

What has been said before answers this point.

The Cummer scale produced a revenue, as compared with the interstate rates, rarely so much as one-half of the revenue prescribed for interstate transportation.

The transportation of logs in Florida affected by the Cummer scale of rates for the years 1926, 1927, 1928, 1929 and 1930 governed 121,916 cars or 3,720,641 tons, or about 50 per cent of all the log tonnage of the entire system of Atlantic Coast Line; and about 7.3 per cent of the total traffic of the system.

In 1930 the Atlantic Coast Line earned on its investment in road and equipment, including material and supplies and cash only 1.17 per cent.

VII. Reply to Point VII of Appellants' Brief (p. 53).

This point is that:

> "The Interstate Commerce Commission has the power to prescribe intrastate rates only when such action has been made to 'clearly appear.' The existence of such jurisdictional facts is a judicial question which must be determined by the judicial branch of the government irrespective of any finding which may have been made by the Interstate Commerce Commission."

This is based upon the theory that the case of *Crowell* v. *Benson* (285 U. S. 22) controls. We have dealt with that subject in our original motion. It is clear that that case does not control.

VIII. Reply to Point VIII of Appellants' Brief (p. 57).

The eighth point is not argued in appellants' brief and is otherwise discussed in this one.

IX. Reply to Point IX of Appellants' Brief (pp. 57-58).

The point made is:

> "The rate comparisons furnished no cause for the invasion of State domain by the Federal power."

It does not appear to be denied that appropriate rate comparisons make very powerful evidence in determining whether or not a rate under attack is unjust and unreasonable. Apparently this point is based upon the theory that some of the railroads established between some of the stations on their respective lines reduced rates on logs. As we have heretofore pointed out, the appellants moved the Commission to reopen the cause to consider the effect of the newly filed tariffs putting in those reduced rates. The

Commission granted that motion and reopened the case and received substantial evidence; and made a further report dated January 9, 1933 (190 I. C. C. 588—See appendix to our original reply). The Commission closely and carefully analyzed all the evidence offered in the reopened hearing and held against the motion. A part of the finding of the Commission in this report, taken from page 598, is as follows:

> "The record warrants the conclusion that truck competition and, to a lesser degree, carrier competition, has been sufficiently compelling in the judgment of the responsible traffic officials of the various railroads operating in the western portion of southern territory to warrant the establishment experimentally of the low per car rates on logs hereinbefore referred to; that these reduced rates have not as yet succeeded in regaining for the railroads which established them any great amount of log traffic; that it is doubtful if the log traffic now moving by truck for the shorter distances, particularly 25 miles and under, can be regained by these or any other rates that the carriers could make; that there is but little competition between defendant and trucks for the movement of logs intrastate in Florida for distances over 25 miles and, in the judgment of defendant's responsible traffic official, it is not of sufficient importance to warrant the establishment or maintenance of subnormal rates in an effort to regain it; and that the circumstances and conditions which occasioned the establishment of the experimental reduced per car rates on logs by other railroads in a section of southern territory quite widely separated from that in which defendant operates are not present with respect to the intrastate log traffic over defendant's lines in Florida."

The Commission further held (page 600):

> "We affirm all of the findings in our prior report on further hearing and will vacate our order suspend-

ing the operation of our order of July 5, 1932, as amended."

This report of the Commission was made the subject matter of attack by the claimants in their supplemental bill in the United States District Court and was considered by that court which not only sustained the Commission but held, in effect, that if they (the court) were making independent findings, they would make the same findings as those made by the Commission.

X. Reply to Point X of Appellants' Brief (p. 59).

This point is:

> "There were no figures of record showing the average cost of hauling logs over the Atlantic Coast Line System."

In its report of July 5, 1932 (186 I. C. C. 185) the Commission states its method of ascertaining the cost of hauling logs in Florida. It first ascertained that:

> "It is indisputable that unit costs are higher in Florida than elsewhere on the system," etc. (186 I. C. C. 184);

and that system figures may be utilized as the basis for approximating the cost of transporting logs in Florida.

When value has been given to the Commission's computations wherein it makes deductions from the freight service operating expenses for many items which are not involved in handling logs, the conclusion can not be escaped that the district court is right in saying:

> "On the question of the cost of the service, figures were considered which showed the average cost of hauling logs over the Coast Line System, exact figures for the particular traffic in Florida not being available."

The Commission pursued calculations which it deemed to be correct and then found:

> "The above figures undoubtedly understate the cost of transporting logs in Florida for several reasons" (186 I. C. C. 187).

This case was begun before the Interstate Commission in May, 1926. It has had many hearings before that Commission and its examiners. It had two hearings in the United States District Court for the Northern District of Georgia, and then it came to this Court on appeal (282 U. S. 194). The lower court was reversed because the Commission had not made adequate intermediate findings of fact to sustain its final finding of unjust discrimination against interstate commerce.

The case was reopened by the Commission and again a great deal of evidence was taken and the Commission made its finding of unjust discrimination against interstate commerce. This latter finding was made after hearings before the whole Commission.

Cases were then brought in the United States District Court for the Northern District of Georgia to set aside that order of the Commission. Those cases were heard in September, 1932. The Commission reopened the case to receive evidence as to certain new carload rates made without regard to weight. Evidence was received at great length and the Commission made its report and order of January 9, 1933 the one now complained of. Supplemental bills were filed and a hearing had in February, 1933, before the district court. That court sustained the Commission's findings and order.

In each of its three orders, the Commission has condemned the Florida state rate as unjust, unreasonable and discriminatory against interstate commerce.

The district court has three times sustained these findings.

This Court's statement of the law applicable to the case, as laid down in the 282 U. S. 194, has been accepted by the litigants, the Commission and the District Court; and the evidence, the findings of the Commission, and the conclusions of law and fact made by the district court all conform to the decisions of this Court.

We respectfully submit that the litigation should now end.

Respectfully submitted.

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August 1, 1933.